U.S. Department of Labor

Board of Alien Labor Certification Appeals
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DATE: August 28, 2000

CASE NO: 2000-INA-66

In the Matter of

TOWSON UNIVERSITY
Employer

on behalf of

STANTON EU HUAT CHEAH
Alien

Certifying Officer: Richard E. Panati, Region III

Before: Burke, Huddleston, and Jarvis
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER

This case arises from Towson University's ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing,

qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of the United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

Statement of the Case

On March 3, 1999, the Employer filed a Form ETA 750 Application for Alien Employment Certification with the Maryland Department of Labor, Licensing and Regulation ("DLLR") on behalf of the Alien, Stanton Eu Haut Cheah. (AF 90-91). The job opportunity was listed as "International Admissions Counselor". The job duties were described as follows:

> Counsels prospective international students and their agents on international admissions process. Evaluates foreign academic credentials and determines admissibility. Attends international educational fairs abroad and visits foreign high schools, colleges and universities to recruit undergraduate and graduate students. Develops curriculum articulation agreements with foreign schools and universities. Enrolls international students to the university and assists with orientation programs. Conducts research in comparative education systems and curriculum development. Maintains international web site and electronic mail process. Designs and develops international admissions publications.

(AF 90). The stated job requirements for the position, as set forth on the application, included a Bachelor's degree and two years of experience in the job offered or in the related occupation of "International Education." (Id.). Other special requirements included that one year of the international education experience must be abroad. Employer defined international education experience as "involvement as a student, instructor, counselor or administrator in the educational programs or services of a foreign country's business, governmental or educational system." (Id.).

On March 29, 1999, DLLR transmitted resumes of 34 U.S. applicants to the Employer. (AF 27-89). The Employer's Results of Recruitment Report, dated April 22, 1999, indicated that the Alien was the most qualified candidate for the position and that none of the applicants were hired. (AF 95-98). Specifically, Employer explained that 29 of the applicants were not qualified for the position and five of the applicants were over qualified. The file was transmitted to the CO.

The CO issued a Notice of Findings ("NOF") on June 22, 1999, proposing to deny the certification for two reasons. (AF 21-23). First, the CO found that Employer's requirements of one year's experience abroad and two years experience in international education are unduly restrictive job requirements in violation of 20 C.F.R. 656.21(b)(2). (AF 22). Second, the CO found that Employer rejected U.S. applicants for non lawful job-related reasons in violation of Section 656.21(b)(6), and that the job opportunity was not clearly open to any qualified U.S. worker in violation of Section 656.20(c)(8). (Id). The CO found that Employer's Results of Recruitment Report stated that the alien was selected for the position because he was the "most qualified" applicant. The CO explained that an employer may not reject otherwise qualified U.S. applicants because they are not as qualified as the alien beneficiary. In addition, the CO found that because the requirement of international experience had been found unduly restrictive, those applicants rejected solely for their lack of international experience are deemed qualified. Finally, the CO noted that Employer rejected five U.S. applicants because it was determined that they were "overqualified" for the position. (AF 23). The CO explained that an employer may not reject U.S. workers on the grounds that they are over qualified and that implicit in such a determination is that the applicants exceeded, and therefore, met the stated job requirements. (Id.). The CO instructed the Employer that it must show that U.S. workers are not able, willing, qualified or available for this job opportunity. (Id.).

The Employer submitted its rebuttal on September 21, 1999, and provided the following information. (AF 5-18). The Employer asserted that the Alien is not employed as a Foreign Student Advisor, but as an International Admissions Counselor. (AF 5). Employer then explained the differences between the two positions and argued that the job requirements were based on business necessity. In addition, Employer provided documentation establishing that the position currently held by the Alien was created in 1994 when Employer first established an Office of Admissions for domestic students. Employer submitted a copy of the original job description, an organizational chart documenting the establishment of the position, payroll forms indicating the starting salary in 1994 and the original International Admissions Counselor's letter of introduction. In establishing the business necessity of international experience, Employer argued that those eleven U.S. applicants lacking international experience were properly excluded from consideration. (AF 8). Employer also argued that those U.S. applicants it rejected for being "overqualified" were not regarded over qualified because of specific job skills and abilities, but because of their advanced degrees. Employer went on to assert that these five candidates lack the appropriate job skills and experience for the position despite their advanced education. Specifically, Employer provided the following evaluations of each applicant's rejection:

> 1. Patricia Read-Hunter demonstrates a strong interest in academic development instead of admissions and comparative educational research curriculum. Not suitable for the position.
>
> 2. Elena Pavlova lacks strong written communication skills. Her cross-cultural experience beyond her native country, Russia, is the U.S., thus insufficient for this position.

> 3. Mark Mascia demonstrates a strong interest in international student advising rather than admissions and comparative educational research and curriculum. Not suitable for the position.
>
> 4. Sumit Ghose's cover letter does not demonstrate strong written communication skills. His strong interest in Residence Life and "faculty recruitment" are not suitable for the position.
>
> 5. Tony Kargbo, a Sierra Leone national, lacks written communication skills as demonstrated by his cover letter. His interest in diplomacy and teaching are not suitable for this position.

(AF 9). Employer did not respond to the CO's finding that Employer rejected otherwise qualified candidates because the Alien was the most qualified applicant for the job.

The CO issued a Final Determination on October 5, 1999, denying certification. (AF 2-4). The CO reviewed Employer's rebuttal evidence and accepted its response regarding the unduly restrictive requirements. (AF 3). The CO also found, therefore, that Employer's rebuttal satisfactorily addressed the issue of those applicants rejected solely for their lack on international experience. (Id.). The CO did find, however, that Employer did not address the issue that an employer may not reject otherwise qualified U.S. applicants because they are not as qualified as the alien. In addition, the CO did not accept Employer's new reasons for rejecting the five U.S. applicants initially rejected for being "overqualified." (Id.). The CO found that Employer's reevaluation of the rejected applicants was based on the information in their resumes and not on interviews with the workers. The CO stated that:

> First, you stated that the applicants were rejected because they had advanced degrees and lacked the appropriate job skills and experience. You went on to state that Read-Hunter and Mascia demonstrated strong interest in academic program development and international student advising, respectively, rather than the advertised position. This explanation is not accepted. You provided no reasons as to how you reached this conclusion,[i.e.], how you determined that the applicants were unqualified for the job based on their supposed interest, or why this factor would disqualify them from consideration. You did not interview the applicants to discuss their interests. You stated that Pavlova, Ghose and Kargbo, in addition to lacking the appropriate interest, did not have strong written communications skills. You do not explain how you reached this conclusion on the basis of the resumes of these applicants.

(AF 3-4). Additionally, the CO noted that Employer's rebuttal clearly contradicts the grounds for rejection that were stated in Employer's letter of April 22, 1999. The letter dismissed each of the applicants with the statement, "Applicant is overqualified." (AF 4). The CO found no assurance in Employer's rebuttal

that over qualification was not in fact the true grounds for rejecting these applicants. The CO concluded that Employer did not provide lawful job-related reasons for rejection of U.S. workers. (Id.).

On November 10, 19989 the Employer filed a timely Request for Review. (AF 1) The file was then forwarded to the Board of Alien Labor Certification Appeals ("BALCA") for review. Employer submitted its statement of position on January 28, 2000.

Discussion

At the outset, we note that Employer did not respond to the CO's finding that otherwise qualified U.S. applicants were rejected because the Alien was the more qualified. Section 656.25 provides an employer with the opportunity to cure or rebut defects cited in the NOF by filing documentary evidence or written arguments with the CO. Section 656.25(e)(3) provides that all findings in the NOF which are not rebutted shall be deemed admitted. Failure to address a finding in the NOF constitutes an admission. *Kamali Oriental Rugs*, 1989-INA-151 (Feb. 21, 1990); *In re Lewis University*, 1988-INA-75 (June 20, 1988). Employer asserted in its appeal that the Alien was the most qualified applicant because none of the other applicants were qualified, and therefore the Alien was not only the most qualified applicant but also the only qualified applicant. As an appellate body we cannot consider information that was not before the CO. *See La Prairie Mining Ltd.*, 1995-INA-11 (Apr. 4, 1997).

Section 656.21(b)(6) states that an employer is required to document that U.S. applicants were rejected solely for job related reasons. Section 656.20(c)(8) requires that the job opportunity must have been open to any qualified U.S. worker. In general, an applicant is considered qualified for a job if he or she meets the minimum requirements specified for that job in the labor certification application. *United Parcel Service*, 1990-INA-90 (Mar. 28, 1991). An employer unlawfully rejects a U.S. worker who satisfies the minimum requirements specified on the ETA 750A and in the advertisement for the position. *American Café*, 1990-INA-26 (Jan. 24, 1991). Section 656.24(b)(2)(ii) provides that the Certifying Officer shall consider a U.S. worker able and qualified for the job opportunity if the worker, by education, training, experience, or a combination thereof, is able to perform in the normally accepted manner the duties involved in the occupation as customarily performed by other U.S. workers.

Section 656.20(c)(8) requires that the job opportunity must have been open to any qualified U.S. worker. There is an implicit requirement that employers engage in a good faith effort to recruit qualified U.S. workers. *Daniel Costiuc*, 1994-INA-541 (Feb. 23, 1996); *H.C. Lamarche Ent., Inc.*, 1987-INA-607 (Oct. 27, 1988). Actions by an employer which indicate a lack of good faith effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are a basis for denying certification. In such circumstances, an employer has not proven that there are not sufficient U.S. workers who are able, willing, qualified and available to perform the work as required under Section 656.1.

The issue in this case is whether Employer rejected U.S. applicants Ghose, Kargbo, Mascia, Pavlova, and Read-Hunter, solely for lawful job-related reasons. The Employer conducted recruitment for the position offered for labor certification during April 1999. (AF 95-99). In a letter sent to the DLLR dated April 22, 1999, the Employer stated that it did not hire applicants Ghose, Kargbo, Mascia, Pavlova, and Read-Hunter because they were "overqualified." (AF 96-97). However, the Employer in its rebuttal stated that these applicants were overqualified by their advanced degrees only, and that they were not qualified for the job opportunity for numerous reasons, listed for the first time in the rebuttal. (AF 8-9). In the FD, the CO found that Employer changed its reasons for rejecting these applicants. The CO also found that Employer provided no basis for these new reasons for rejection as the applicants had never been contacted or interviewed. The Employer, in its appeal, argues that it based its rejection of these applicants on their resumes and cover letters and that: "The Immigration and Nationality Act does not require applicant interviews for the alien employment certification process. It is appropriate to evaluate applicants based only on the information in the cover letters and resumes."

We emphasize that it is Employer's burden to establish that all U.S. applicants were rejected solely for lawful job-related reasons. In the instant case, we find that the Employer has not met this burden for several reasons. First, it is well settled that an employer cannot reject a U.S. applicant because the applicant is overqualified for the job. *See, e.g., World Bazaar*, 1988-INA-54 (June 14, 1989) (*en banc*); *All American Computers*, 1997-INA-143 (March 16, 1998); *Our Lady of Good Counsel Elementary School*, 1994-INA-262 (June 9, 1995). Second, based on their resumes, these applicants appear qualified for the job and therefore we find that Employer had a duty to further investigate the credentials of all five applicants. Where an applicant's resume shows a broad range of experience, education, and training that raises a reasonable possibility that the applicant is qualified, although the resume does not expressly state that he meets the job requirements, an employer bears the burden of further investigating the applicant's the applicant's credentials. *Gorchev & Gorchev Graphic Design*, 1989-INA-118 (Nov. 29, 1990) (*en banc*), *Frank's Auto Body*, 1996-INA-224 (Dec. 11, 1997). We note that Employer made no efforts to contact the applicants. An employer must make efforts to contact qualified U.S. applicants in a timely manner after receipt of their resumes from the state job service agency. Failure to timely contact the U.S. applicants indicates a failure to recruit in good faith. *Loma Linda Foods, Inc.*, 1989-INA-289 (Nov. 26, 1991) (*en banc*). In light of the fact that Employer did not contact any of the U.S. applicants, we find that Employer has not established a good-faith recruitment effort. In addition, we note that in its rebuttal to the NOF, the Employer set forth new reasons for rejecting these applicants. The Board has held that a CO is not required to investigate the legitimacy of a totally independent reason for rejection offered by the employer for the first time in response to the NOF. *Foothill International, Inc.*, 1987-INA-637 (Jan. 20, 1988); *see also American Café, supra*. We agree with the CO that this rebuttal was not responsive to the NOF. Furthermore, we also agree with the CO that Employer's argument on rebuttal was inconsistent with its previous assertions.

Based on the foregoing, we find that Employer has failed to establish that all U.S. applicants were rejected solely for lawful, job-related reasons. Moreover, we find that Employer has not established that

he engaged in a good-faith recruitment effort. Accordingly, the CO's denial of labor certification is hereby AFFIRMED.

Order

The Certifying Officer's denial of labor certification is affirmed.

For the Panel:

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DONALD B. JARVIS
Administrative Law Judge

San Francisco, California